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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 267

ROBERT ALLEN, CLAIMANT,

Appellant,

vs.

THE GLENN L. MARTIN COMPANY, EMPLOYER, AND GLOBE INDEMNITY COMPANY, INSURER

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

DANIEL E. KLEIN,
Counsel for Appellees.

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IN THE COURT OF APPEALS OF MARYLAND

No. 100, October Term, 1946

ROBERT ALLEN, CLAIMANT,

Appellant,

vs.

THE GLENN L. MARTIN COMPANY, EMPLOYER, AND GLOBE INDEMNITY COMPANY, INSURER,

Appellees

APPEAL FROM COURT OF APPEALS OF MARYLAND

APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

The Appellees, The Glenn L. Martin Company, Employer, and Globe Indemnity Company, Insurer, pursuant to Rule 7, Par. 3, and Rule 12, Par. 3, of the Supreme Court of the United States, set forth the following matters and reasons against the jurisdiction of this Court in the instant case, and move the Court to dismiss the appeal herein for the following reasons:

(1) Because the judgment sought to be reviewed is not based upon a Federal ground adequate to support a review.

(2) Because there is no substantial Federal question or controversy involved in this appeal.

SUPPORTING BRIEF

In support of the aforegoing motion the Appellees make the following statements:

Statement of Case

This is an appeal from a judgment of the Court of Appeals of Maryland in a case decided by that Court under the "other cases" provision of the Workmen's Compensation Act of Maryland, Article 101, Sec. 48, sub-section 3 (now, Section 35, sub-section 3), Code of Public General Laws of Maryland (1939 Ed.), which provides:

> "Other Cases. In all other cases in this class of disability the compensation shall be fifty per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment, or otherwise, if less than before the accident (but not to exceed $18.00 per week) payable during the continuance of such partial disability, but not to exceed $3,000.00, and, subject to reconsideration of the degree of such impairment by the Commission on its own motion, or upon application of any party in interest."

The Appellant, Robert Allen, sustained an accidental injury to his back on or about August 30, 1944 while in the employ of The Glenn L. Martin Company. He lost no time from his employment as a result of his injury but claimed a permanent partial disability to his back, and on June 6, 1945 filed a claim for compensation. The case was heard on September 20, 1945 by Dr. Thomas W. Koon, one of the members of the State Industrial Accident Commission, and on the testimony and medical reports submitted at the hearing, the Commissioner decided that as a result of the injury sustained, the Appellant "was not temporarily totally disabled but did sustain a permanent partial disability to his back and has concluded to allow compensation under 'other

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cases' the sum of $750.00 for such disability," and an order by the Commission was passed requiring the Appellees to pay the Appellant "compensation at the rate of $18.00 per week, payable weekly, for the period of 41⅔ weeks not to exceed, however, the sum of $750.00 under 'other cases'; said compensation herein awarded to begin on September 2, 1944; subject to the provisions of the Workmen's Compensation Law of Maryland." All of this awarded compensation was paid by the Appellees.

The Appellant entered an appeal to the Baltimore City Court from the aforementioned decision of the State Industrial Accident Commission. This appeal was for the purpose of enlarging the award of $750.00. While the said appeal was pending the Court of Appeals of Maryland on April 14, 1946 decided the case of *Townsend* v. *Bethlehem-Fairfield Shipyard, Inc., et al.*, 47 A. 2d, 365 (hereinafter referred to as the *Townsend* case). This case decided that no appeal was allowable from decisions of the Commission limiting the award of compensation under the "other cases" provision of the Act to less than the amount of $3,000.00, the maximum stated in the Act, as long as the weekly compensation rate was fixed by the Commission at the maximum permitted by the statute. On the authority of the *Townsend* case decision, the Appellees filed a motion in the Baltimore City Court and an order was passed thereon, requiring the Appellant to show cause why his appeal from the decision of the Commission should not be dismissed.

Pursuant to the aforesaid order *nisi*, the Appellant filed an answer to the Appellees' motion contending that the method adopted by the Commission in arriving at its decision in the instant case was not in accordance with the "other cases" provision of the statute, and was unconstitutional in that it violated the rights guaranteed the Appellant under the 14th Amendment of the Constitution of

the United States and the 23rd Article of the Declaration of the Rights of Maryland. The Appellant asked the Baltimore City Court to reverse the decision of the Commission because he contended that in arriving at the amount of compensation awarded him, the Commission used a method illegal, unconstitutional, and unlawful.

The Baltimore City Court heard the case on the motion to dismiss the appeal and the answer filed thereto, and passed an order remanding the case to the Commission for further proceedings, "to determine the loss of wage-earning capacity of the Claimant, if any, and such other pertinent matters as may be heard by the Commission therewith," because "it appearing to the Court that no testimony was offered before the Commission relative to the loss of wage-earning capacity of the claimant, if any." From this order the Appellant appealed to the Court of Appeals of Maryland contending that the *Townsend* decision amended the "other cases" provision of the Act by judicial interpretation, and as applied and enforced in the instant case, was unconstitutional. That the decision placed a construction upon the "other cases" provision of the Act which had an effect at total variance to its clear and unambiguous statutory requirements, and that this interpretation gave the Commission uninhibited and unhamelled discretion without any guide, standard, basis, or rule to be followed, or to conform to, so as to fully and fairly compensate claimants under the "other cases" provision. Secondary contentions of the Appellant in the Court of Appeals of Maryland were that the trial court erred in remanding the case to the Commission, and also in expunging from the petitioner's answer and from the testimony adduced at the trial, all matters and exhibits relating to cases decided by the Commission, other than the instant case.

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The case was argued in the Court of Appeals of Maryland together with two companion cases in which appeals have likewise been taken to *this* Court—*Frank Hyman* v. *Robb Tyler, Employer and Eagle Indemnity Company, Insurer,* 52 A. 2d 610, and *James Benoni* v. *Bethlehem-Fairfield Shipyard, Inc., Insurer,* 52 A. 2d 613. The Court of Appeals of Maryland in its decision and opinion (*Robert Allen* v. *The Glenn L. Martin Co., et al.,* 52 A. 2d 605) sustained the constitutional validity of the "other cases" provision of the Act as previously construed by it and as interpreted and applied in this case. The Court of Appeals further found no error in the trial court's ruling excluding evidence, but found formal error in the order of the trial court remanding the case to the Commission; therefore, it reversed and remanded, with directions, however, for the entry of a judgment affirming the decision of the Commission.

The substance of all the assignments and contentions of the Appellant in their last analysis is that the construction placed upon the "other cases" provision of the Workmen's Compensation Act of Maryland by the Court below is repugnant to the 14th Amendment to the Federal Constitution because such construction gives to the State Industrial Accident Commission unlimited authority and discretion to allow compensation thereunder without any prescribed guide, rule, basis or standard, reasonably adapted to produce a fair result.

In short, Appellant seeks to have *this* Court review and revise the construction affixed to a State statute, as to a State matter, by the Court of last resort of the State.

This is the sole premise upon which Appellant asks *this* Court to entertain jurisdiction.

The Construction Placed By the State Court Upon Its Own Statutes and Constitution Will Not Be Reviewed By the Supreme Court.

The decision of the Supreme Court in the case of *Quong Ham Wah Co.* v. *Industrial Commission,* 255 U. S. 445, involved a question so closely parallel to the one here presented that we respectfully submit, it disposes of the right of Appellant to sustain this appeal.

In the case cited, a State Court of last resort construed to be valid a provision of the Workmen's Compensation Act of its State, and the Appellant sought a writ of error to reverse the judgment.

In considering the writ of error sought, the Supreme Court said, page 448:

> "All the assignments and contentions made rest in their last analysis upon the assumption that, despite the construction of the statute made by the court below, it still must be here treated as repugnant to the Constitution because operating the discrimination originally complained of. But it is elementary that this Court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the State. *Commercial Bank* v. *Buckingham,* 5 How. 317, 342; *Johnson* v. *New York Life Insurance Co.,* 187 U. S. 491, 496; *Ross* v. *Oregon,* 227 U. S. 150, 162; *Ireland* v. *Woods,* 246 U. S. 323, 330; *Stadelman* v. *Miner,* 246 U. S. 544; *Erie R. R. Co.* v. *Hamilton,* 248 U. S. 369, 371-372. It is hence obvious that the proposition upon which a lone jurisdiction to entertain the writ can be based is so wanting in foundation as to be frivolous and therefore to impose upon us the duty to dismiss the cause for want of power to entertain it. *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Goodrich* v. *Ferris,* 214 U. S. 71, 79; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Sugarman* v. *United States,* 249 U. S. 182, 184, *Berkman* v. *United States,*

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250 U. S. 114, 118; *Piedmont Power & Light Co.* v. *Town of Graham*, 253 U. S. 193.

True it is elaborately argued that the court below erred in supposing that the statute was susceptible of the construction which it affixed to it and that, instead of adopting that construction, its duty was to hold the statute void for repugnancy to the Constitution on the grounds which were urged. But this in a different form of statement but it disputes the correctness of the construction affixed by the court below to the state statute and assumes that that construction is here susceptible of being disregarded upon the theory of the existence of the discrimination contended for when, if the meaning affixed to the statute by the court below be accepted, every basis for such contended discrimination disappears. It follows that the argument but accentuates the frivolous character of the federal question relied upon."

To the same effect:

Cudahy Co. v. *Parramore*, 263 U. S. 418, 422;
Ward & Gow v. *Kunsky*, 259 U. S. 503, 510.

Holding that the Supreme Court in the exercise of its appellate jurisdiction is bound by the construction of the state law adopted by its court of last resort.

And see generally:

Concordia Ins. Co. v. *School Dist.*, 282 U. S. 545;
Morehead v. *N. Y., ex rel. Tipaldo*, 298 U. S. 587, at 609;
Gregg Dyeing Co. v. *Query*, 286 U. S. 472;
G. N. Ry. Co. v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358;
Hawks v. *Hamill*, 288 U. S. 52;
Glenn v. *Filed Packing Co.*, 290 U. S. 177;
Hicklin v. *Coney*, 290 U. S. 169;
Burns Mfg. Co. v. *Fried*, 292 U. S. 487;
Highland Farms Dairy, Inc. v. *Agnew*, 300 U. S. 608;

Midland Realty Co. v. *Kansas City P. & L. Co.*, 300 U. S. 109;
Lauf v. *E. G. Shinner & Co.*, 303 U. S. 323, 338;
Carmichael v. *Southern Coal and Coke Co.*, 301 U. S. 495, at 507;
Ross v. *Oregon*, 227 U. S. 150.

Since the Construction of the Stae Court Controls, No Federal Right of Appellant Is Infringed and No Federal Question Is Involved.

The inquiry here is whether the statute is constitutional as applied and enforced in respect to the situation presented.

Appellant contends that the construction by the Court below of the "other cases" provision is repugnant to the 14th Amendment to the Federal Constitution because it gives unlimited authority and discretion to the Commission to allow compensation without any prescribed guide, rule, basis or standard reasonably adopted to produce a fair result.

That this contention is without merit, is clearly shown by the Court below in its opinion in this case (*Allen* v. *The Glenn L. Martin Co., et al, supra*) at page 608:

> "Whether statutory guides or standards to effectuate a public policy are adequate or not, depends largely upon the nature of the subject matter. Compare *Field* v. *Clark*, 143 U. S. 649, 12 S. Ct. 495, 36 L. Ed. 294 and *Currin* v. *Wallace*, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441. If the policy is sufficiently defined, it is immaterial that the process may involve the fixing of liquidated amounts without express definition. Compare *Chesapeake & Potomas Tel Co.* v. *State Board of Forestry*, 125 Md. 666, 675, 94 A. 322.
>
> The statute under "other cases", and as interpreted by this Court, sets a maximum limit as to the amount of compensation to be allowed and gives to the Commission the right to determine the amount to be paid

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within this limit. The statute, the Workmen's Compensation Act, was held constitutional by this Court in the case of *Solvuca* v. *Ryan & Reilly Co.*, 131 Md. 265, 101 A. 710. The general policy of the Compensation Act is set out therein, Chapter 800 of the Acts of 1914. The Act now in effect defines the public agency, the State Industrial Accident Commission, which is to apply it and the subparagraph in dispute sets a maximum limit.

The same section which provides for "other cases" also provides, for "disfigurements", that "compensation shall be allowed in the discretion of the Commission, for not less than ten weeks nor more than one hundred weeks, as the Commission may fix, in each case having due regard to the character of the mutilation and disfigurement as compared with mutilation and injury hereinbefore specifically provided for." In *Sweeting* v. *American Knife Co.*, 226 N. Y. 199, 123 N. E. 82, 83, affirmed as to constitutionality in *New York Cent. R. Co.* v. *Bianc*, 250 U. S. 596, 40 S. Ct. 44, 63 L. Ed. 1161, the disfigurement provision of the New York statute was attacked on the ground that it violated due process, in it left the matter largely to the discretion of the Commission. Judge Cardozo said: 'The Commission has found that there has been serious facial disfigurement, and that award of $2,500 is fair and equitable. * * * It is true that the Commission has a wide discretion, and in fixing a fair and equitable compensation it may inquire into all the circumstances that will help to guide its judgment. * * * Given the fact of injury, the commission is to assess the damages. The presumption is that all relevant circumstances have been weighed in the assessment. * * * Nor does the statute become invalid because the Commission has some discretion in fixing the amount. The Legislature may provide for such a method of 'adjustment, determination and settlement' as it will. * * * Some injuries, as for instance the loss of a limb, may be so defined and classified that the appropriate compensation may, with a fair average of justice, be estimated in advance. But cases of

disfigurement have their special problems. It is difficult, if not impossible, to define and classify the injuries. A flexible compensation makes for justice alike to employer and to workman.' To the same effect, see *Schwartz* v. *Mt. Vernon-Woodberry Mills,* 206 S. C. 227, 33 S. E. 2d 517."

• • • • • • •

"The commission's discretion to determine the aggregate amount of compensation in "other cases" (within the statutory maximum) is not an arbitrary discretion, but must be exercised on the basis of substantial evidence. In effect, our construction of the "other cases" provision is that the aggregate amount of compensation shall be determined in the discretion of the Commission, in each case having due regard to the character of the permanent partial disability, and the impairment of wage-earning capacity therefrom, as compared with the scheduled cases of permanent partial disability specifically provided for. This construction is not reducible to a mathematical formula, but permits on appeal judicial review of abuse of discretion, within the limits set out in our recent opinion in *Bethlehem-Sparrows Point Shipyard v. Damasiewicz, supra* (50 A. 2d 799). For 'other cases' the maximum aggregate is less than that fixed for scheduled permanent partial disabilities and still less than for permanent total disability. The Commission may properly consider these statutory differences in comparing the character of disabilities and the impairment of wage-earning capacity in 'other cases.' As we have repeatedly held, the Commission may find impairment of earning capacity, i. e., potential loss of earnings, although no actual loss of earnings may have occurred."

Conclusion

The Appellant, under the guise of attacking the constitutionality of the "other cases" provision, seeks to have *this* Court compel the highest Court of Maryland to construe

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and interpret this provision in a manner different and contrary to the uniform construction placed upon the "other cases" provisions since 1928 by the Court of Appeals of Maryland—*Allen* v. *Glenn L. Martin, et al., supra,* at pages 609 and 610:

> "In the case at bar, as the claimant was awarded the maximum weekly payment, there was no question of fact for the jury or for the court sitting as a jury on appeal. The case presented only a question of law as to whether the Commission abused its discretion or acted arbitrarily in fixing the period of time for which compensation was allowed and thereby in fixing the limit of $750. In the *Townsend case,* supra (47 A. 2d 372), in speaking of an award for permanent partial disability under 'other cases,' this Court said: 'It has been the law for 18 years, and was the administrative practice for a number of years before the first decision of this Court in 1928 that the total award could be less than the maximum.' Therefore the only question before the Trial Judge was whether the Commission had acted arbitrarily in limiting the award to $750."

The sole purpose of this appeal is to ask *this* Court to review the construction given a State statute by the highest Court of that State, which *this* Court has consistently refused to do. Hence there is no Federal question involved and *this* Court is without jurisdiction to review the case.

The only result the Appellant could obtain by these proceedings is that *this* Court declare the "other cases" provision of the Act unconstitutional on whatever grounds such decision might be based. But invalidating the "other cases" provision of the Act is not sought by the Appellant, rather he attempts to seek a result which could not be obtained in *this* Court; namely, that Appellant's interpretation of an admittedly constitutional and unambiguous provision of a State statute be substituted for that placed upon it by the Court of Appeals of Maryland.

The effect of the only decision obtainable by the Appellant in this appeal; to wit, a holding that the "other cases" provision is unconstitutional, would result not only in the Appellant losing his right to the compensation awarded but would also adversely affect all employees who have, and are now, receiving compensation on awards made under this section of the Workmen's Compensation Act. The consequence would be a calamity to workmen and untold chaos.

It is respectfully submitted that for the reasons stated the Supreme Court is without jurisdiction and Appellees' motion to dismiss should be granted.

Respectfully submitted,

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